

FCC ENFORCEMENT UPDATE

July 10, 2009

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This edition summarizes notable FCC-related enforcement matters from January 22, 2009 through June 28, 2009, which is the period that Commissioner Copps served as Interim FCC Chairman. Questions or comments may be addressed to David H. Solomon at 202-383-3369 or dsolomon@wbklaw.com.

Broadcast Indecency Enforcement

- The Supreme Court found that the Commission had adequately explained for Administrative Procedure Act purposes its new strict policy on “fleeting expletives.” It thus reversed and remanded the Second Circuit’s opinion striking down the Commission’s new policy. In light of its opinion in the “fleeting expletives” case, the Supreme Court also vacated and remanded the Third Circuit’s opinion striking down the forfeiture in the Janet Jackson/Super Bowl case.
- Both the fleeting expletives and Super Bowl cases are now back in the courts of appeals for further consideration. Further action in one or both of those cases may result in the Supreme Court addressing for the first time in 30 years the constitutionality under the First Amendment of the FCC’s approach to broadcast indecency.

CPNI Enforcement

- The Enforcement Bureau issued an Omnibus Notice of Apparent Liability (“NAL”) proposing to issue forfeitures of \$20,000 each against 666 companies (for a total of \$13.3 million) for failure to submit an annual Customer Proprietary Network Information (“CPNI”) certification.
 - The proposed \$20,000 forfeiture amount is a reduction from the \$100,000 NALs that were previously issued under Chairman Martin for such violations.
- The Bureau also issued more than 80 NALs, ranging in amount from \$1,000 to \$6,000 (for a total of \$190,000), for defective CPNI certifications. Common defects included: (1) failure to include an accompanying statement explaining how the company’s operating procedures ensure that it is or is not in compliance; (2) failure to include a description of actions taken against data brokers; (3) failure to include a summary of customer complaints received in the past year concerning the unauthorized release of CPNI; and (4) failure to have the certification signed by an officer of the company.

Equipment Enforcement

- The Commission or the Enforcement Bureau issued NALs or entered consent decrees for about \$400,000 regarding equipment-related enforcement, including a \$175,000 NAL against a manufacturer of personal computer analog-only TV cards that the Commission found did not comply with the FCC’s rules regarding digital television tuners. The Commission rejected the manufacturer’s argument that the TV cards were not covered by the rule because they were computer peripheral devices that could not function without being installed in a personal computer. In other equipment cases, the Commission or the Bureau issued forfeiture orders for more than \$60,000.

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USF Enforcement

- The Commission or the Enforcement Bureau issued NALs or entered into consent decrees for over \$350,000 regarding compliance with the Universal Service Fund contribution rules and related matters. The Enforcement Bureau suspended five individuals and disbarred three individuals from the E-Rate program for criminal convictions related to E-Rate fraud. The Commission also issued a \$2.8 million forfeiture order, reduced from more than \$10 million based on changes in the Commission's understanding of the facts.

Network Outage Reporting Enforcement

- The Enforcement Bureau entered into a \$200,000 consent decree regarding compliance with the Commission's network outage reporting rules.

Other Notable Actions

- **Switched Digital Video.** The Commission overturned Enforcement Bureau forfeiture orders and related NALs issued in late 2008 against two cable operators' deployment of switched digital video technology. The Commission found that the forfeitures and NALs were inconsistent with the "plain meaning" of the rules.
- **Cable Program Carriage.** The Commission rejected the Media Bureau's late 2008 reassertion of jurisdiction over program carriage complaint cases that had been designated for hearing before an administrative law judge and returned the cases to the ALJ for hearing.
- **Auction Anti-Collusion.** The Enforcement Bureau issued a \$75,000 NAL on an auction participant for engaging in a prohibited communication and failing to notify the Commission.
- **Non-Commercial Underwriting.** The Enforcement Bureau issued a \$20,000 NAL against a non-commercial educational broadcast licensee regarding its broadcast of advertisements during thousands of separate broadcasts, in apparent violation of the FCC's underwriting rules. The Bureau issued NALs for \$7,500 and \$2,500 and a \$2,000 forfeiture order for other underwriting violations.
- **Sponsorship Identification.** The Enforcement Bureau entered into a \$50,000 consent decree relating to sponsorship ID/payola issues.